

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TROY ALEXANDER BERTLING,
Petitioner.

No. 2 CA-CR 2015-0253-PR
Filed October 1, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR067115
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Troy Alexander Bertling, Eloy
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Petitioner Troy Bertling seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Bertling has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Bertling was convicted of second-degree murder. The trial court sentenced him to an aggravated, twenty-two year prison term. Bertling thereafter sought and was denied post-conviction relief twice, and this court denied relief on review in both proceedings. *State v. Bertling*, No. 2 CA-CR 2003-0051-PR (order filed June 16, 2004); *State v. Bertling*, No. 2 CA-CR 2006-0075-PR (memorandum decision filed Jan. 16, 2007).

¶3 In February 2013, Bertling initiated another proceeding for post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and was unable to "find any legitimate basis for relief under Rule 32." In a supplemental, pro se petition, however, Bertling argued that the decisions of the United States Supreme Court in *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), constituted a significant change in the law entitling him to relief. The trial court summarily denied relief, and also denied his subsequent motion for rehearing.

¶4 On review, Bertling again contends he is entitled to relief based on *Lafler* and *Frye* and his claim is exempt from

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preclusion as a significant change in the law. Bertling is correct that, in *Lafler* and *Frye*, the Supreme Court acknowledged a defendant has a right to effective representation by counsel during plea negotiations. See *Lafler*, ___ U.S. at ___, 132 S. Ct. at 1384; *Frye*, ___ U.S. at ___, 132 S. Ct. at 1407-08. But it already has long been the law in Arizona that a defendant is entitled to effective representation in the plea context. See *State v. Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d 1193, 1198, 1200 (App. 2000). Thus, *Frye* and *Lafler* do not mark a “transformative event” in the law that would give rise to a claim based on Rule 32.1(g). *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009) (“change in the law” for purpose of Rule 32.1(g) “requires some transformative event, a ‘clear break from the past’”), quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991); see also *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012) (*Frye* and *Lafler* did not decide new rule of constitutional law, but “merely applied the Sixth Amendment right to effective assistance of counsel according to the test articulated in [*Strickland v. Washington*, 466 U.S. 668, 686 (1984)], and established in the plea-bargaining context in [*Hill v. Lockhart*, 474 U.S. 52 (1985)]”). Accordingly, any such claim of ineffective assistance of trial counsel is precluded. See Ariz. R. Crim. P. 32.1(a), (g), 32.2(a)(3) (claim precluded if waived in previous collateral proceeding).

¶5 Although we grant the petition for review, we deny relief.